GASING MERIDIAN SDN BHD

v.

DATUK BANDAR KUALA LUMPUR

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
ARIFIN ZAKARIA JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-04-108-01]
16 DECEMBER 2003

LOCAL GOVERNMENT: *Town planning - Planning control - Federal Territory (Planning) Act 1982 - Power of Commissioner to issue requisition notice under s. 30 - Nature and exercise of power, whether entirely and subjectively discretionary - Whether refusal of Commissioner to issue requisition notice amenable to judicial review and mandamus - Discontinuance of use of land under s. 30(1)(a), meaning of*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Refusal of Commissioner to issue requisition notice under s. 30 Federal Territory (Planning) Act 1982 - Whether refusal of Commissioner amenable to judicial review - Whether mandamus lies - Whether power of Commissioner to issue requisition notice entirely and subjectively discretionary*

The appellant, a developer, had earlier purchased a few lots of land in the Federal Territory of Kuala Lumpur ('the land') with a view to constructing some bungalows thereon for sale. Thereafter, the appellant applied to the respondent/Datuk Bandar Kuala Lumpur ('the Commissioner') for approval to: (i) carry out the construction of roads and drains to service the land; and (ii) carry out the earthwork respecting the construction of the said roads and drains. The Commissioner approved stage (i) of the proposed construction work but required the appellant to apply *de novo* for the approval of stage (ii) upon the completion of stage (i). Unhappy with this decision of the Commissioner, the appellant appealed to the Appeal Board under s. 23 of the Federal Territory (Planning) Act 1982 ('the Act'). Whilst agreeing with the appellant that it would neither be economical nor practical to develop the land in two stages (as was proposed by the Commissioner), the Appeal Board, nevertheless, also agreed with the Commissioner that the gradient of the land was such that it could not be developed in one single phase (as was proposed by the appellant). Ultimately, the Appeal Board dismissed the appellant's appeal for the land to be developed in one single phase.

Thereafter, the appellant requested the Commissioner to issue a 'requisition notice' under s. 30 of the Act. The Commissioner declined. The appellant then requested the Appeal Board to clarify its decision and the Appeal Board replied reiterating its earlier decision and orders. The appellant then filed an *ex parte* originating motion praying for: (a) an order of mandamus directing the Commissioner to issue a requisition notice under s. 30 of the Act; or alternatively (b) a declaration that the decision of the Appeal Board amounted to a requisition notice by the Commissioner to the appellant and, consequently, the appellant was entitled to issue a 'purchase notice' to the Commissioner under s. 46 of the Act. In addition, the appellant also prayed for damages and interest. The High court rejected the appellant's motion and the appellant appealed to the Court of Appeal.

Held (dismissing the appeal):
Per Abdul Hamid Mohamad JCA

[1a] Before a requisition notice can be issued, the Commissioner himself must be satisfied with regard to s. 30(1) of the Act. It is **not** for the court to be satisfied with the stipulations of the said section and then direct the Commissioner to issue a requisition notice. The situation in the instant case was not one wherein the Commissioner has exercised his discretion under the said section and the aggrieved party applies to the court for judicial review and *certiorari* to quash the decision of the Commissioner. The appellant here was trying to substitute the court for the Commissioner. (p 229 e-g)

[1b] Section 30 of the Act does **not** impose a duty on the Commissioner to issue a requisition notice. In only empowers him to do so if and when he is satisfied with respect to the preconditions in s. 30(1) of the Act. Even if the prerequisites in s. 30(1) of the Act are met, the exercise of the Commissioner's power to issue a requisition notice is still discretionary. The court is not to usurp the power of the Commissioner. (p 231 d)

[2] Under s. 30(1) of the Act, the satisfaction of the Commissioner that a particular 'use of land has to be discontinued' is a precondition to the issuance of a requisition notice. Here, the Commissioner **never** decided that the use of the land should, or was to be, discontinued. The designated use of the land for 'bangunan' (building) remained the same. The critical issue was whether the earthwork for the development of the land was to be carried out in one or two stages. The Commissioner decided that it had to be done in two stages and this was confirmed by the Appeal

Board which dismissed the appellant's appeal for the land to be developed in one single phase. The decision of the Appeal Board meant that the Commissioner's original decision – that the appellant could develop the land in two stages – still stood. Evidently, the facts of the instant case did not fall within the scope of either paras (a), (b) or (c) of s. 30(1) of the Act. (pp 229 h, 230 a-h & 231 a)

[3] The contention that the decision of the Appeal Board amounted to a 'requisition notice' by the Commissioner to the appellant was preposterous. (p 231 a-c)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu, sebuah syarikat pemaju, sebelum ini telah membeli beberapa lot tanah di Wilayah Persekutuan Kuala Lumpur ('tanah') dengan hasrat untuk membina beberapa rumah banglo di situ untuk dijual. Perayu kemudian memohon kepada responden/Datuk Bandar Kuala Lumpur ('Pesuruhjaya') bagi kebenaran untuk: (i) membina jalan-jalan dan longkang bagi kegunaan tanah; dan (ii) melakukan kerja-kerja tapak bagi pembinaan jalan-jalan dan longkang tersebut. Pesuruhjaya meluluskan peringkat (i) pembinaan yang dicadangkan tetapi mengkehendaki perayu memohon *de novo* bagi pembinaan peringkat (ii) setelah pembinaan peringkat (i) siap. Berasa tidak puas hati dengan keputusan Pesuruhjaya, perayu merayu kepada Lembaga Rayuan di bawah s. 23 Akta (Perancangan) Wilayah Persekutuan 1982 ('Akta'). Sementara bersetuju dengan perayu bahawa adalah tidak ekonomik atau praktikal untuk memajukan tanah dalam dua peringkat (sebagaimana yang dicadangkan oleh Pesuruhjaya), Lembaga Rayuan, namun begitu, juga bersetuju dengan Pesuruhjaya bahawa kecuraman tanah adalah begitu rupa sehinggakan ianya tidak boleh dibangunkan melalui satu peringkat sahaja (sebagaimana yang dicadangkan oleh perayu). Lembaga Rayuan, dengan itu, menolak rayuan perayu untuk membangunkan tanah melalui satu peringkat pembangunan.

Perayu kemudian meminta Pesuruhjaya mengeluarkan satu notis requisition di bawah s. 30 Akta. Pesuruhjaya enggan. Berikutnya perayu meminta supaya Lembaga Rayuan menjelaskan keputusannya dan Lembaga Rayuan telah berbuat demikian. Selepas itu perayu memfailkan usul pemula *ex parte* memohon: (a) satu perintah mandamus memerintahkan Pesuruhjaya mengeluarkan notis requisition di bawah s. 30 Akta; atau (b) satu perisytiharan bahawa keputusan Lembaga Rayuan adalah merupakan satu notis requisition oleh Pesuruhjaya kepada perayu yang berakibat, perayu berhak untuk mengeluarkan 'notis pembelian' kepada Pesuruhjaya di bawah s. 46 Akta. Selain itu, perayu juga memohon ganti rugi dan faedah. Mahkamah Tinggi menolak usul perayu dan perayu merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan):
Oleh Abdul Hamid Mohamad HMR

[1a] Sebelum suatu notis requisition boleh dikeluarkan, Pesuruhjaya sendiri hendaklah berpuashati berkaitan s. 30(1) Akta. Ianya bukanlah fungsi mahkamah untuk berpuas hati dengan peruntukan-peruntukan seksyen tersebut dan kemudian mengarahkan Pesuruhjaya mengeluarkan notis requisition. Ini bukanlah satu kes di mana Pesuruhjaya telah melaksanakan budibicaranya di bawah seksyen tersebut dan pihak yang terkilan memohon kepada mahkamah untuk kajian semula dan *certiorari* bagi membatalkan keputusan Pesuruhjaya. Perayu nampaknya cuba menggantikan Pesuruhjaya dengan mahkamah.

[1b] Seksyen 30 Akta tidak mewajibkan Pesuruhjaya untuk mengeluarkan notis requisition. Ia hanya memberinya kuasa untuk berbuat demikian jika dan bilamana beliau berpuas hati berkaitan keperluan-keperluan s. 30(1) Akta. Jikapun keperluan-keperluan s. 30(1) Akta telah dipenuhi, pelaksanaan kuasa Pesuruhjaya untuk mengeluarkan notis requisition masih bersifat budibicara. Mahkamah tidak akan merampas kuasa Pesuruhjaya tersebut.

[2] Di bawah s. 30(1) Akta, kepuasan hati Pesuruhjaya bahawa sesuatu 'kegunaan tanah telah dihentikan' adalah satu syarat bagi satu-satu pengeluaran notis requisition. Di sini, Pesuruhjaya tidak pernah membuat keputusan bahawa kegunaan tanah tersebut patut, ataupun mesti, dihentikan. Kegunaan tanah untuk 'bangunan' masih lagi kekal. Isu kritikalnya adalah sama ada kerja-kerja tapak bagi pembangunan tanah harus dijalankan melalui satu atau dua peringkat. Pesuruhjaya memutuskan bahawa ia harus dilaksanakan dalam dua peringkat dan itu telah disahkan oleh Lembaga Rayuan apabila menolak rayuan perayu untuk membangun tanah dalam satu peringkat. Keputusan Lembaga Rayuan bermakna keputusan asal Pesuruhjaya – bahawa perayu harus membangunkan tanah dalam dua peringkat – masih kekal. Jelas bahawa fakta-fakta kes semasa tidak dirangkumi oleh sama ada peranggan (a), (b) ataupun (c) s. 30(1) Akta.

[3] Hujah bahawa keputusan Lembaga Rayuan adalah merupakan satu 'notis requisition' oleh Pesuruhjaya kepada perayu adalah tidak munasabah.

Legislation referred to:
Federal Territory (Planning) Act 1982, ss. 5, 6, 7-18, 22, 23, 30(1), 46

For the appellant - Cecil Abraham (N Segaran); M/s SK Yeoh & Partners
For the respondent - Romesh Abraham (Janice Leo); M/s Shook Lin & Bok

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:

Gasing Meridian Sdn. Berhad, the appellant in this court is the registered proprietor of various lots of land in Kuala Lumpur ("the lands") which it purchased on 31 October 1995 for RM60 million. To pay for part of the purchase price, the appellant took a loan of RM34 million from a bank. In 1998 part of the lands was acquired pursuant to the Land Acquisition Act 1960. The appellant's intention was to develop the lands for sale (a) with bungalows constructed on them and/or (b) as land suitable for the construction of bungalows.

By letters dated 5 August 1996, the appellant applied to the respondent for approval to do the following:

(i) To carry out the construction of roads and drains to service the lands;

(ii) To carry out the earthworks with respect to the aforementioned roads and drains.

On 11 June 1999, the respondent issued an approval for the first stage of the works. Upon completion of the first stage, the appellant was required to make a fresh and separate application for approval of the second stage. The appellant was unhappy with the stage-by-stage approval. The appellant said that it was not possible to carry out the works pursuant to the two-stage approval. The appellant appealed to the Planning Appeals Board pursuant to s. 23 of the Federal Territory (Planning) Act 1982 ("the Act").

On 25 August 2000, the Planning Appeals Board gave its decision, as follows:

> (a) We agree with the submissions by the company that it is prohibitive and not viable for the land to be developed in two stages. The development in these two stages as proposed by the DBKL cannot be carried out by the company because of viability and other factors as pointed out by the company.
>
> Taking into consideration the submissions, the DBKL's view that the land (the 82 lots) as a whole is too steep and not suitable for the development as proposed by the company in their proposed development plan. We have visited the place and agreed with the DBKL views that

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if the company is to carry out development of land as a whole in a single phase, it could not be done because contour of the land especially the upper part is too steep.

The appeal by Gasing Meridian Sdn. Bhd. for one stage approval is therefore dismissed.

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(b) Perintah memihak responden selepas pendengaran.

Rayuan ini setelah didengar di hadapan Lembaga Rayuan pada 25 haribulan Ogos 2000.

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Adalah pada hari ini diperintahkan bahawa Rayuan ditolak dengan kos. Bertarikh 25 haribulan Ogos 2000.

Subsequently, on 13 September 2000, the appellant wrote to the respondent asking the respondent to issue a requisition notice under s. 30 of the Act. The respondent through their solicitors by letter dated 27 September 2000 declined

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the request.

On 18 October 2000, upon request by the respondent, the appellant applied to the Planning Appeals Board for clarification of the order of 25 August 2000. By a letter dated 8 December 2000 the Board clarified the decision as follows:

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(i) Rayuan oleh Gasing Meridian Sdn. Bhd. ditolak dengan kos;

(ii) Mengikut pandangan Syarikat dari segi praktik dan ekonomi tanah tersebut tidak dapat dibangunkan sebagai dua (2) peringkat.

(iii) Tanah tersebut tidak dapat dimajukan sekali gus sebagai satu (1) peringkat kerana ketinggian tanah yang begitu curam.

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On 4 October 2000 the appellant filed an *ex parte* originating motion praying for the following orders:

(a) An order of mandamus directing as follows:

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That the Respondent within 14 days from the date of the order issue to the Applicant the "requisition notice" pursuant to s. 30 of the Federal Territory (Planning) Act 1982 with respect to the Applicant's lands held under Lots No.37180 to Lot No. 37255 (inclusive) and Lots No. 37257 to No. 37262 (inclusive) all in the Mukim of Kuala Lumpur, Wilayah Persekutuan ("Lands") less the lots and/or parts of the lots already

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acquired pursuant to the Land Acquisition Act 1960 ("Acquired Lots").

(b) In the alternative to paragraph (a) above, declarations declaring as follows:

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(i) That the order pronounced by the Appeals Board (as established pursuant to s. 45 of the Federal Territory (Planning) Act 1982) on 25.08.2000 amounts to a "requisition notice" by the Respondent to the Applicant with respect to the Lands (less the Acquired Lots) pursuant to s. 30 of the Federal Territory (Planning) Act 1982.

(ii) That consequent to paragraph (b)(i) above, the Applicant be entitled to issue a purchase notice to the Respondent with respect to the Lands (less the Acquired Lots) pursuant to s. 46 of the Federal Territory (Planning) Act 1982.

(c) Further and in addition to paragraph (a) or (b) above, for the following:

(i) An order that the Respondent do pay to the Applicant damages equal to the interest accrued on the loan obtained by the Applicant from Arab-Malaysian Bank Berhad, commencing from 11.06.99 to the date the Respondent makes full payment of the sum to be paid to the applicant for the acquisition, requisition and/or purchase of the Lands (less the Acquired Lots) pursuant to the Federal Territory (Planning) Act 1982 and/or the Land Acquisition Act 1960.

(ii) An order that the Respondent do pay to the Applicant interest at the rate of 8% per annum on the sum to be paid to the Applicant for the acquisition, requisition and/or purchase of the Lands (less the Acquired Lots) pursuant to the Federal Territory (Planning) act 1982 and/or the Land Acquisition Act 1960, commencing from 11.06.99 to full payment thereof.

(d) All such other consequential orders with respect to any one or more of the above, as the Honourable Court shall deem fit.

On 18 July 2001 the High Court dismissed the application. The appellant appealed to this court. On 8 April 2003, we heard the appeal and dismissed it with costs.

We think it is important, at the outset, to get a clear picture of the order that the appellant was asking the court to make.

The appellant bought the lands with a view to developing it, selling the bungalows and bungalow lots and make a profit. For that purpose it applied for the planning permission from the respondent. The respondent gave the approval for the first stage first. The appellant will have to apply for the approval of the second stage after the first stage is completed. The appellant was not happy with that. The appellant wanted an approval for both stages to be given simultaneously, because a two-stage approval is more costly and time consuming. But, according to the respondent it was inevitable as it was a "hillslope development" and the respondent had to take into account, which it

did, in attaching the conditions such factors as safety, environmental preservation, prevention of disruption to the neighbouring residential area, pollution, flooding etc. Having failed to get what it wanted, the appellant filed the originating motion for an order of court to order the respondent to issue the requisition notice under s. 30 of the Act. The purpose was to enable the appellant to serve a purchase notice on the Commissioner with a view to cause the Commissioner to initiate steps to acquire the lands in accordance with the provisions of the Land Acquisition Act 1960 and get compensated for it. To achieve its purpose, the appellant had come to court, requesting the court to exercise its powers of judicial review to order the respondent to issue the requisition notice.

To appreciate the rationale of the appellant's application in the High Court, we should briefly trace the scheme of the Act, in so far as it is relevant to the case. The preamble of the Act says that it is "an Act to make provisions for the control and regulating of proper planning in the Federal Territory …"

By s. 5, the Commissioner appointed under the Federal Capital Act 1960 was appointed to exercise all the functions and powers conferred and to perform the duties imposed on him by the Act. By s. 6, the functions of the Commissioner "shall be to regulate, control and plan the development of all lands within the Federal Territory and the use of such lands and buildings …" which include to "prepare and implement the development plan." Part III, ss. 7 to 18 talks about development plans. Part IV, ss. 19 to 30, deal with planning control. Section 19 provides that no person "shall use or permit to be used any land or building or commence, undertake or carry out any development otherwise than in conformity with the development plan or any planing permission granted under this Act in respect of the development." Section 20 prohibits development without planning permission. Section 21 provides the manner in which the application for planning permission is to be made to the Commissioner. Section 22 provides, inter alia, that the "Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan ..." Such permission, if granted may be with or without conditions. Section 23 provides that an appeal against the decision of the Commissioner may be made to the Appeal Board by an applicant aggrieved by the decision of the Commissioner in refusing his application for planning permission or who is aggrieved by any condition imposed by the Commissioner in granting permission in respect of his application. Subsection (3) provides for the type of orders that the Appeal Board May make. They are:

(a) confirming the decision of the Commissioner and dismissing the appeal; or

(b) allowing the appeal by directing the Commissioner to grant planning permission subject to such conditions as the Appeal Board may think fit; or

(c) allowing the appeal by directing the Commissioner to remove or modify any condition subject to which planning permission has been granted or to replace such condition with such other condition as the Appeal Board may think fit.

Section 45(12), provides:

> (12) An order made by the Appeal Board on an appeal before it shall be final, shall not be called into questioned in any court, and shall be binding on all parties to the appeal or involved in the matter.

We go back to s. 30. As this section featured prominently in the course of the arguments, the section, though quite lengthy should be reproduced:

> 30. Requisition notice.
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> (1) Without prejudice to section 27, if the Commissioner is satisfied:
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> (a) that any use of land should be discontinued; or
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> (b) that conditions should be imposed on the continued use thereof; or
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> (c) that any building or works on any land should be altered or removed,
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> the Commissioner may, by notice, which in this Act is referred to as the "requisition notice", served on the owner of the land:
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> (i) require the discontinuance of that use; or
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> (ii) impose such conditions for the continued use of the land as may be specified in the requisition notice; or
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> (iii) require such steps as may be specified in the requisition notice to be taken for the alteration or removal of the buildings or works as the case may be;
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> and the owner shall, within such period as may be specified in the requisition notice, not being less than one month from the date of service of the notice, comply with such requirements or conditions.
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> (2) A person aggrieved by a requisition notice may, within the period stated therein and in the manner prescribed, appeal to the Appeal Board.

(3) If an appeal is filed under subsection (2), the requisition notice shall be suspended until the determination or withdrawal of the appeal.

(4) In considering an appeal under subsection (2), the Appeal Board shall hear the appellant and the Commissioner.

(5) If the owner of the land to which the requisition notice relates has, in consequence of complying with the notice, suffered damage in the form of a depreciation in the value of the land or incurred expenses or costs in carrying out works in compliance with the notice, he may claim from the Commissioner, within the time and in the manner prescribed, compensation as the Commissioner considers adequate.

(6) If a claim is made under subsection (5) the Commissioner shall, after giving the person making the claim an opportunity to be heard, offer him such compensation as the Commissioner considers adequate.

(7) If the person to whom compensation is offered under subsection (6) is aggrieved by the amount thereof, he may, within the time and in the manner prescribed, appeal to the Appeal Board and the Appeal Board shall assess the amount of compensation to be paid.

(8) A person who fails to comply with a requisition notice served on him under subsection (1) within the period specified therein or, where an appeal has been made under subsection (2), within such period after the determination or withdrawal of the appeal as may be specified by the Commissioner commits an offence and is liable, on conviction, to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine which may extend to five hundred ringgit for each day during which the offence is continued after the conviction for the first commission of the offence.

(9) Without prejudice to subsection (8) if within the time specified in the requisition notice, there is no compliance, the Commissioner or any person so authorised by him, may enter with or without workmen upon the land and take such steps as may be necessary to execute the requisition notice including the demolition or alteration to any building or works or removal of any goods, vehicles or things from any building or land and in such event subsections (2) and (3) of section 29 shall mutatis mutandis apply.

Briefly, the section provides that if the Commissioner is satisfied that any use of land should be discontinued etc., the Commissioner may issue and serve a requisition notice on the owner of the land requiring the owner of the land to discontinue the use of the land and the owner must comply with the notice. If the owner is aggrieved by the requisition notice, he may appeal to the Planning Appeals Board. If, in consequence of complying with the notice, the owner had suffered damage in the form of a depreciation in the value of the land or

incurred expenses or costs, he may claim compensation for the damage, expenses or costs from the Commissioner. The Commissioner may then offer the owner such compensation as the Commissioner considers adequate. If the owner is aggrieved by the amount offered, again he may appeal to the Planning Appeals Board and the board shall assess the amount of compensation to be paid to the owner. Subsection (8) makes it a criminal offence for a person who has been served with the requisition notice to fail to comply with the notice. The Commissioner may also enter the land and take such steps as may be necessary to execute the requisition notice including the demolition of any building and so on.

We now go to Part VIII (Purchase Notice and Acquisition of Land) which consists of only one section, s. 46. This section, *inter alia*, enables a registered proprietor of land who claims that, by reason of compliance with a requisition notice under s. 30, the land is incapable of reasonable beneficial use, may serve on the Commissioner a purchase notice, the final effect of which is that the land will be acquired in accordance with the Land Acquisition Act 1960 and the registered proprietor will be compensated for it.

Is s. 30 applicable on the facts of this case? First, s. 30(1) reads "... if the Commissioner is satisfied ... that any use of land should be discontinued ..." It is the Commissioner who has to be satisfied. Only then the rest of the provision will follow. It is not for the court to be satisfied and then force it on the Commissioner. What the appellant is doing here is to substitute the court for the Commissioner, to exercise the powers provided by s. 30. That is clearly misconceived. The situation here is different from that where the Commissioner has exercised his discretion under the section and the appellant applies to court for a judicial review to quash the decision by way of *certiorari*. In such a situation the court may look at the decision making process and other relevant factors to see whether the Commissioner has come to a decision which is legal and reasonable. But, that is not the case here. Here the court is asked to decide for the Commissioner and to direct the Commissioner to accept it as his decision. Or, to put it the other way, the court is being asked to tell the Commissioner "You must be satisfied and do what you have to do." That is a very ridiculous proposition. To do that is to do a most injudicious act in the name of judicial review.

Secondly, sub-s. (1) of that section uses the words that any use of the land "should be discontinued" and not "is discontinued" or "has been discontinued". What it means is that, under the scheme of the Act, if the Commissioner is satisfied that any land use is to be discontinued, eg, in the present case, the land use of "bangunan" is to be discontinued, then the Commissioner may issue the requisition notice.

In the instant case, the land use was not discontinued and the Commissioner did not decide that it should be discontinued. It remains "bangunan". The question whether the earthworks is to be done in one or two stages has nothing to do with discontinuing the use of the lands.

Reliance was placed on what was alleged to have been said by the Chairman of the Appeal Board during the hearing of the appeal before the Appeal Board. But, the question is, what did the Appeal Board decide? For that we should look at the order. Unfortunately, the "Perintah" dated 25 August 2000 does not follow the normal format of an order. It contains what appears to be the grounds for the decision given by the Board in English followed by the order in Malay. Thus the first paragraph, in particular, has given some grounds for making the application in question. However, the only order made by board is contained in one sentence:

> Adalah pada hari ini diperintahkan bahawa Rayuan ditolak dengan kos.

If anyone has any doubt what the appeal is about, the "perintah" also makes it very clear when it states:

> The appeal by Gasing Meridian Sdn. Bhd for one stage approval is therefore dismissed.

Actually, the clarification by the Appeal Board was completely unnecessary. However, of the three sub-paragraphs in the clarification letter, only para (i) is of any significance and it confirms what the order says, namely, that the appeal against the decision of the respondent giving approval for the first stage and requiring an application for approval to be made subsequently was dismissed. So, the original approval of the respondent stands.

Hence para. (a) of s. 30(1) is not applicable. What about para. (b)? That paragraph talks about a situation where the Commissioner is satisfied that conditions should be imposed on the continued use of the land. In other words, even though the use of the land is not discontinued, but the Commissioner is satisfied that conditions should be imposed, then he may issue the requisition notice. Everything that we have said regarding para. (a) applies here. Again the respondent did not impose conditions on the (continued) use of the land. So, the case is not covered by para. (b) of s. 30(1).

Paragraph (c) of s. 30(1) is completely unconnected with the facts of the instant case. Paragraph (c) talks about building or work on any land should be altered or removed in which case the Commissioner, if so satisfied, may issue the "requisition notice".

So, the provisions of s. 30 regarding the issuance of the requisition notice are not applicable to the facts of the instant case. The section clearly cannot be invoked.

In the alternative the appellant had prayed for a declaration that the order of the Planning Appeals Board dated 25 August 2000 amounted to a requisition notice under s. 30 and that the appellant be entitled to issue a purchase notice to the respondent within the definition of s. 46 of the Act and to claim for damages and other consequential orders. This, we think is a preposterous request. First, the person having the authority to issue the requisition notice, if he is satisfied, is the Commissioner, not the Planning Appeals Board. Secondly, the appeal to the Planning Appeals Board was over the two stage approval, not over the issue or the refusal or failure to issue the requisition notice. That too was the subject matter of the decision of the Planning Appeals Board.

Furthermore, it must be stressed that s. 30 does not impose a duty on the Commissioner to issue a requisition notice. It only empowers him to do so, if he is satisfied that one of the conditions required by s. 30(1) is satisfied. So, even if the conditions are satisfied (in this case, they are not) still it is a matter of discretion for the Commissioner whether to exercise the power or not. And, before exercising it he has to be satisfied that the matter falls within the provisions of the section. The court should not usurp the power given to the Commissioner, exercise it and direct the Commissioner to carry it out. On top of that mandamus, by itself, is a discretionary remedy. Even if all the conditions are satisfied (which are not), it is still within the discretion of the High Court whether to issue it or not.

On these grounds we dismissed the appeal with costs and ordered that the deposit be paid to the respondent on account of taxed costs.